

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**



75-2125

VOLUME III

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA, ex rel :  
THOMAS F. BYRNES :  
Petitioner-Appellant :  
-against- :  
HAROLD J. SMITH, Superintendent :  
Attica Correctional Facility :  
Respondent-Appellee :  
-----x

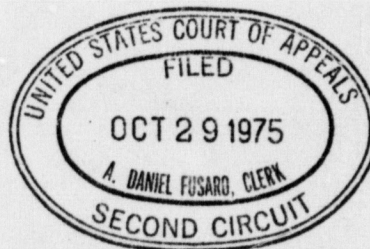
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DOCKET NO. T-4950

On Appeal from the United States District  
Court for the Eastern District of New York

APPENDIX FOR PETITIONER-APPELLANT

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COUNTY COURT : NASSAU COUNTY  
PART VI

----- x  
THE PEOPLE OF THE STATE OF NEW YORK :

-against-

: Ind. #31912

THOMAS FRANCIS BYRNES,

Defendant.

----- x  
Mineola, New York  
December 1, 1971

B e f o r e :

HON. FRANK X. ALTIMARI, County Court Judge,  
and a Jury.

A p p e a r a n c e s :

(As heretofore mentioned.)

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MINUTES OF TRIAL BY JURY  
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(Defendant present.)

(Jury not present.)

THE CLERK: People versus Thomas Francis Byrnes.

MR. BEKOFF: People are ready.

MR. VAN NORMAN: Defendant is ready.

THE COURT: Gentlemen, do you wish to--

MR. VAN NORMAN: I wish to talk to your Honor  
at the Bench, off the record.

THE COURT: No. On the record.

(Discussion at the Bench, on the record.)

MR. VAN NORMAN: The defendant has made a  
request to me, your Honor, to speak to his wife.  
She is present. I don't believe that the District  
Attorney has any intention of calling her any further.  
If I understand the defendant correctly, after his  
discussion, assuming that she will talk to him and  
you will give him permission, he may be inclined  
to want to take a plea. I am not making any promise  
on that.

THE COURT: Neither am I. There will be  
no promise whatsoever.

MR. VAN NORMAN: I am just saying, just

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pointing out to the Court this is a request. I see no detriment to either the Court or to anyone.

THE COURT: I suggest that he be shackled at the time.

MR. VAN NORMAN: Yes, shackled and inside and all precautions necessary.

THE COURT: Fine. Very good, gentlemen.

MR. BEKOFF: Before we do that, may I speak to Mrs. Byrnes to see if she wants to?

THE COURT: All right.

MR. BEKOFF: I will let the Court know in a moment.

THE COURT: All right.

(Pause during proceedings.)

(Discussion at the Bench, on the record.)

MR. BEKOFF: Mrs. Byrnes told me that she doesn't want to talk to him. If he has any message for her, to arrange it through Mr. Van Norman or myself or the Court. But at this time, she doesn't want to personally confront him.

MR. VAN NORMAN: I will relay that to him, your Honor.

THE COURT: All right.

(Pause during proceedings.)

MR. VAN NORMAN: The defendant is ready to proceed, your Honor.

THE COURT: All right. Do you wish to be heard with regard to the continued presence of this defendant in the Courtroom while the witness, Tammy Byrnes testifies?

MR. VAN NORMAN: Yes, your Honor, I have discussed this earlier with the defendant and it appears that he gives me the assurance to give the assurance to the Court that there will be no further outbursts. Last night we did our research as we promised the Court we would do. And it appears that the criteria layed down by the case in which Judge Murtagh was involved has not been reached in this particular matter.

THE COURT: In what regard?

MR. VAN NORMAN: Well, the outbursts in that case, your Honor, were in numbers of five or six hundred outbursts during the course of the trial when finally the Judge decided certain rules had to be

layed down.

THE COURT: This is a bit different to the extent that his outbursts are not directed at the Court but at a particular witness who happens to be his daughter.

MR. VAN NORMAN: I realize that, your Honor.

THE COURT: And that this Court is convinced that it is a deliberate and intentional act to intimidate this young girl of tender age. So that there is a tremendous difference.

MR. VAN NORMAN: I realize that, your Honor. And I also realize the fact that we do have certain guarantees to the defendant and those guarantees I, as his attorney, must try to insure that they are kept, one of them being that I must be able to confer with him during the course of the trial.

Now, he has given me his assurance. I respectfully request of the Court that you give him another chance in order to make it possible that I be able to carry on a proper defense for this particular individual.

THE COURT: You know, counsel, the position

you take is rather inconsistent. For at the outset you indicate that the young lady should not testify because of the trauma that she would receive by so testifying.

MR. VAN NORMAN: And my position hasn't changed on that at all, your Honor.

THE COURT: And now what you are asking me to do is to heap more trauma upon it. She witnessed here a spectacle yesterday, four outbursts the likes of which disturbed the adults in this Courtroom. What kind of an effect did it have on an eleven year old child who has been called upon to testify to certain facts involving her father? This is far different than the ordinary disruptive behavior of a defendant in a criminal trial. This is, in my opinion, a directed, deliberate, thought-out process of intimidation. There is such a thing as the integrity of the judicial process. And this Court will guarantee that integrity. I will take your application under advisement. I will be back in exactly three minutes. Don't leave the Courtroom.

MR. VAN NORMAN: Thank you, your Honor.

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(Pause during proceedings.)

(In Chambers.)

THE COURT: Let the record indicate that we are in my chambers and that present are the following: Counsel for the defendant, counsel for the People, Tammy Byrnes and others associated with my staff.

Tammy, I am going to ask you a question. I am going to ask you to come into the Courtroom. If your father is present, what is your pleasure? What do you want me to do?

WITNESS TAMARA BYRNES: I am not going in.

THE COURT: All right, gentlemen, that's it.

(The following occurred in Open Court.)

THE COURT: All right. Counsel, do you wish to be heard?

MR. VAN NORMAN: Yes, and I apologize in advance for the emotionality of that which I am about to say, your Honor. The defendant, at any trial, has the right to be confronted by the witnesses against him. You know, as well as I do, your Honor, that the witness that is about to be

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put on the stand by the People is a witness which we have objected to being put on the stand for various legal reasons.

Number one, we objected based upon the fact that the exclusive jurisdiction over this child should have remained vested in the Family Court under the Family Court Act, and there is a proceeding in Family Court. We objected on the medical reason that the very doctors that have been taking care of this child over a period of time, that those doctors said that she should not be required to testify in this trial. We have made every effort as defense counsel to work out a solution to this particular matter in order to avoid, based upon your Honor's ruling, that she should testify.

Now, I realize the defendant jumped yesterday up and made an outburst in this Court. But I had advised the Court earlier in the day that it was my opinion at the time he was under the influence of some narcotic drug which had been given to him under a normal prescribed period of time at the Nassau County Jail. That during the time he had saved

some of the drug until he finally had a large accumulation of it and had taken it yesterday. And as a result of that, was not completely coherent and ready and willing to continue the trial. The Court, at its discretion, did not feel that what I had said was proper. It felt that it was not correct. He acted up. But he has a right to confront the witnesses that are about to be put against him. And this is the only witness that can make this particular case, your Honor. And I strongly object to the fact the witness is asked in chambers whether or not she will appear and she says, "if my father is in that Courtroom, I won't appear."

I think you have denied the defendant a right if you exclude him from this trial, a right which is preserved to him by the Constitution not only of the State of New York, but of the United States of America. And you will deny him a fair and impartial trial. I have assured the Court in my discussion with him this morning, and I find him more coherent and lucid this morning than he was yesterday, that he will make no outbursts whatsoever. You can

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shackle him to that chair, you can put something over his mouth. You can tie him up in knots, if necessary, your Honor, but he is to be present in this Courtroom. Leave one hand open so he can write me notes as to anything the child says so I can properly put a defense in for the defendant. But don't take him out of this Courtroom and destroy his right to confront the witnesses against him.

THE COURT: I understand your position. The following is the Court's position:

✓ At the opening of Court on November 30th, 1971, this Court was informed by the Sheriff's office that the defendant was, and I quote, "acting up", unquote. ✓

MR. VANNORMAN: Excuse me, your Honor. May the record indicate that you are reading from a text that you have prepared?

THE COURT: Yes. I think that is clear.

MR. VAN NORMAN: We take exception that you are reading from a text at this time after we have just made the motion to have him present in Court.

THE COURT: I understand that.

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MR. VAN NORMAN: The decision was rendered prior to me even making an argument on it.

THE COURT: I might say that I lost most of the sleep last night concerning myself with this problem, anticipating your very remarks because what you say is in fact, in most situations proper, that there is an absolute Constitutional guarantee of confrontation. This Court is not oblivious to that.

X I was further informed that he had been treated at Meadowbrook Hospital for a slight or at least, a self-imposed laceration the evening before. The defendant claimed to have taken some ninety pills the evening of November 29th, 1971, after the Court day. This Court immediately informed counsel for the defendant and an opportunity was afforded counsel to privately chat with his client. A hearing was to have taken place at nine o'clock so as to determine whether or not the defendant's eleven year old daughter would in fact, testify at all. The attorney for the defendant petitioned this Court to recess the hearing and the trial until

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two o'clock so that the defendant might become more composed. This Court granted that application even though it was convinced that the defendant's actions and behavior were, in fact, feigned and calculated to disrupt and interrupt the orderly conduct of this trial.

At two o'clock, this Court convened in the presence of the defendant and after a hearing, decided that the eleven year old daughter of the defendant would, in fact, testify. On that very same day and prior to the calling of the next witness, the defendant rose from his seat, moved about in a small area and stated substantially that he did not wish to be in the Courtroom and that he was then leaving. The Sheriff's office and the deputies assigned to this Courtroom, restrained the defendant and he sat down after having been admonished by this Court. The defendant then violently rose, swung both arms and had to be forcibly restrained once again. At all times uttering remarks that I do not wish to repeat but the record will bear witness to them. Handcuffs were then placed on the defendant.

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All of which took place in the absence of the jury. The Court then attempted to reason once again with the defendant. And after some dialogue, which the record will bear out, the defendant promised to behave himself, as he is now promising to behave himself. At which point I directed the Sheriffs to remove the handcuffs. They did so, I understand, reluctantly, just from the manner in which they did so. That prior to the removal of the handcuffs this Court warned the defendant that if his present behavior continued, that the trial would proceed in his absence.

This Court then had another recess. The counsel for the defendant was again afforded the opportunity to speak to his client in a separate room. The defendant then returned to the Courtroom. The jury was then called and seated. The People then called the defendant's daughter, Tammy Byrnes, to the witness stand. She came into the Courtroom and just as she was seated, the defendant jumped from his seat, leaped on the counsel table and lunged in the direction of the witness chair in an assaultive

manner and nature, calling his daughter's name in a very loud manner and uttering other remarks.

The jury was then immediately excused and admonished by this Court. And once again, this Court attempted to calm the defendant and reason with him.

Unlike the first occasion, the defendant would not hear this Court, stating words in substance, "I am not going to listen." This Court is of the view that the defendant's acts were deliberate and were intended to intimidate the young witness. This Court is of the opinion that the defendant's acts were calculated to accomplish that end, to wit, that his daughter not testify. This Court is aware of the relationship between the proposed witness and this defendant. The record speaks clearly that the young witness, Tammy Byrnes, did in fact take the witness stand, that this Court afforded this defendant the right of confrontation, and at that time the defendant did confront his daughter. And finds as a fact that this witness of tender age, after having observed the spectacle as described above, to wit, the father leaping upon the table and

being forcibly restrained, that she was in fact intimidated.

It is worthy to note that throughout the selection of the jury and during the first day of the trial, this defendant behaved as any other defendant would have behaved charged with a most serious crime or crimes. It was not until the question of whether or not his daughter would or could testify came to light, that his behavior became disruptive and contumacious.

The Supreme Court of the United States, stated in Illinois versus Allen and I cite 397 U. S. 337 in 19 and 70, that there are three Constitutional permissible ways for a trial Judge to handle an obstreperous defendant, one of those methods is to remove him from the Courtroom and to proceed with the trial in his absence. Although it is no pleasure for this Court to direct that a defendant be removed from the Courtroom, this defendant has given me no other choice or alternative.

Within minutes after promising no further disruptive behavior, he engaged in disruptive and

intentional conduct that prevented the continuation of the trial. Defense counsel had been informed that the trial would continue without the defendant's presence if there were further outbursts.

This Court, in speaking with the defendant after the first outburst, in effect told the defendant the consequences of his behavior.

Therefore, the defendant's continuous, deliberate and intentional disruptive conduct which was calculated to intimidate the young witness, this Court directs that the defendant be removed from the Courtroom during the testimony of Tammy Byrnes.

He may reclaim his right to be present when he is willing to conduct himself consistently with the decorum and respect which is inherent in a judicial proceeding. And upon a determination that he is not likely to engage in disruptive conduct.

At any time during the examination of any witness and in particular, the testimony of young Tammy Byrnes, defense counsel may request a recess to communicate with the defendant who will be within this very Courthouse and very near to this Courtroom

or defense counsel may instruct his assistant to carry forth any messages to or from the defendant.

I cite to you Part 702, Section 702 (1) and 702.3, Special Rules of the Second Judicial Department Appellate Division, concerning the conduct of criminal trials threatened by disruptive conduct. And I further cite to you, Criminal Procedure Law 340.50.

I now direct the Sheriffs to remove this defendant out of this Courtroom and to a nearby room where he may be called upon by his attorney at any time. X

(Defendant is escorted from the Courtroom by the Sheriffs.)

MR. VAN NORMAN: Your Honor, I respectfully request if I might discuss this with my defendant?

THE COURT: All right. We will take a short recess.

(Recess.)

(After Recess.)

THE CLERK: People versus Thomas Francis Byrnes.

THE COURT: All right. Gentlemen, all the

spectators are asked to leave.

THE CLERK: All spectators, please leave the Courtroom.

(Defendant not present.)

(Jury not present.)

MR. VAN NORMAN: Your Honor, for the record, we note our exception to the Court's ruling. We strongly oppose the Court's ruling. We wish to point out the condition of the defendant after he left this Courtroom, it was a total emotional breakdown, and we again renew our motion for an examination of the defendant to determine whether or not he is capable of carrying on the rest of this trial.

THE COURT: I understand your position. The application is denied.

MR. VAN NORMAN: Again, we take exception.

THE COURT: Counsel, there is no need for me to say anything further, except that I understand your position and I sympathize with it. This is something which I really believed would never happen in my Courtroom. It has and I do not consider it

a light decision, it was a burdensome one, it troubled me all of last evening. I think it can fairly be stated that I could anticipate your objection this morning and the grounds for your objection. I was convinced that this child was in fact intimidated. This is not a question of a disruptive trial to the extent that the defendant disrupts the trial totally with regard to every witness. It is just one witness he is directing himself against. And the relationship is such a strong one, father and daughter, that I can understand that she is, in fact, intimidated.

I do not say it lightly, but it is the only way I know of affording to all sides a fair trial. And I don't think we can discuss it any further because I think the record is clear. And I be wrong, some higher tribunal will correct me. X

MR. VAN NORMAN: Thank you, your Honor.

Who are the people in the back, your Honor?

THE CLERK: That's the Law Department.

THE COURT: Do you want them out?

MR. VAN NORMAN: No, it is all right, your

Honor.

THE COURT: I might say this, that the young witness, Tammy Byrnes, who is about to be called, has indicated that she wants the young police woman to be with her. I have asked the policewoman to take her badge off. There seems to be a very close attachment between these two. There is a great insecurity on the part of this witness. I have allowed her to come into the Courtroom. I know you except to that ruling most strenuously. Your exception again is noted.

MR. VAN NORMAN: Could I be heard on that, your Honor?

THE COURT: All right.

MR. VAN NORMAN: Your Honor, I feel that this policewoman, it is almost to the point of the same type of intimidation that you say Thomas Byrnes has created in this child, intimidation in the other direction. And I must strongly object to that policewoman being present during the testimony that is given in this Courtroom.

THE COURT: I have attempted to have the young

girl come in without the policewoman. The little girl has indicated, in fright almost, she just doesn't want to come in here without this young policewoman. Now, listen to me carefully, I have attempted to comply with your request. I think it is reasonable to now, at this point, to deny your application. If you wish to spread reasons on the record, again, do so, and we will continue.

MR. VAN NORMAN: We just take an exception to your ruling, your Honor, and point out to you the very thing that was argued before your Honor yesterday, that's the effect upon this child is being proved right now.

THE COURT: You have your exception. Bring the jury in.

(Jury present.)

(Defendant not present.)

THE COURT: Come up, gentlemen.

(Discussion at the Bench, on the record.)

THE COURT: All right.

MR. VAN NORMAN: Your Honor, I believe it will be your intention to qualify the witness because of

her tender age.

THE COURT: I think I have already qualified her.

MR. VAN NORMAN: I think it is possible and I think it would be better if I am to cross examine her on her qualifications only, your Honor, that such cross examination be taken outside of the presence of the jury.

THE COURT: No, I don't think that you can cross examine on qualifications of a witness under the age of twelve or whatever the age is. I think the Court must first be satisfied. And this Court is in fact satisfied. I have had, as you know, in your presence, numerous conversations I have talked to her about what the significance of an oath would be, that she would be called upon to take an oath. She in my opinion, is well and able to do so. You have another exception.

MR. VAN NORMAN: Thank you very much, your Honor.

THE COURT: All right.

(The following occurred in Open Court.)

THE CLERK: People versus Thomas Francis Byrnes.  
Trial continued.

MR. BEKOFF People ready.

MR. VAN NORMAN: Defendant ready.

THE CLERK: Members of the Jury, please give  
your attention to roll call.

(Roll call of jury; all present.)

THE CLERK: Jury all present, your Honor.

THE COURT: All right. Good morning, Madam  
and gentlemen of the jury, I will now repeat the  
admonition of yesterday. You observed undoubtedly,  
the behavior and outburst here of the defendant.  
That is not the evidence. I am sure it will not be  
considered by you as such. Again, you will decide  
this case on the evidence and the law alone. Again,  
I am going to point out the obvious, the defendant  
is not present in this Courtroom this morning.  
Again I ask you and direct you not to consider that  
in your deliberations at all. You are to again  
decide this on the evidence and the evidence alone.  
And that is that which comes from the mouths of the  
witnesses and the exhibits which are offered into

evidence. I am sure that you can follow this. I am certain you will. Proceed.

(Defendant not present.)

MR. BEKOFF: If it please the Court, the People will call Tamara Byrnes.

(Tamara Byrnes takes the witness stand.)

THE COURT: Stand up and raise your right hand.

(Witness sworn in by the Clerk.)

THE CLERK: Do you solemnly swear the answers you will give on this trial will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes.

T A M A R A    B Y R N E S ,    2435    28th Street, Astoria,  
New York, called as a witness on behalf of the People,  
and being first duly sworn, testified as follows:

THE COURT: Now, whenever you have a problem,  
you talk to me. I am right here.

DIRECT EXAMINATION

BY MR. BEKOFF:

Q        Tamara, do you have a nickname?

A        Yes.

Q        What is that name?

A        Tammy.

Q Do you mind if I call you Tammy?

A No.

Q Tammy, how old are you?

A Eleven.

Q And when were you born?

A July, 1960.

Q Would you say the date again?

A July, 1960.

Q Now, Tammy, do you know your mother's name?

A Yes.

Q What is that?

A Marie Byrnes.

Q And do you know your father's name?

A Yes.

Q What is that?

A Thomas Byrnes.

Q Do you know a man by the name of Eugene Abrams?

A Yes.

Q And did you ever go to his house?

A Yes.

Q When was the first time you went to his house?

A In 1969.

Q How old were you then?

A Nine.

Q And how did you get to his house?

A By car.

Q And whose car was that?

A Gene's.

Q And anybody go with you?

A Yes.

Q Who went with you?

A Gene, his wife and two kids.

Q Do you know the two kids names?

A Eddie and Lisa.

Q And anyone else with you?

A My father.

Q All right. Did Gene pick you up?

A Yes.

Q Where did he pick you up?

A By the Neptune Diner.

Q How far is the Neptune Diner from your house?

A It is not far.

Q And what did you do when you got to Gene

Abrams' house?

A We went swimming and I was playing with the

kids.

Q Incidentally, do you know where Gene Abrams lives?

A Bellmore.

Q Is that on Long Island?

A Yes.

Q What else happened?

A And we were watching movies.

Q What kind of movies?

A Dirty.

Q When you say, "dirty movies", what do you mean?

MR. VAN NORMAN: Objection, your Honor.

THE COURT: Objection to the answer?

MR. VAN NORMAN: Yes.

THE COURT: All right. That is stricken.

What kind of movies?

THE WITNESS: Dirty.

THE COURT: Well, can you tell us not too much about it but just a little bit about it?

THE WITNESS: People with no clothes on.

THE COURT: All right.

Q And what happened, honey, after you saw all

the movies?

A We took pictures.

Q Who did that?

A Gene.

Q Who did he take pictures of?

A Me.

Q Did you have clothes on when he took pictures of you?

A No.

Q How old were you at this time?

A Nine.

Q And was your daddy there when he took pictures?

A Yes.

Q After he took pictures, did you see Gene give your daddy anything?

A Yes.

Q What did he give him?

A Money.

Q Did there come a time when you went back to Gene Abrams house again?

A Yes.

Q Was that in November of 1970?

A Yes.

Q And how old were you then?

A Ten.

Q And how did you get to Gene's house again?

A By car.

Q And who was with you?

A Just Gene and my father and me.

Q What happened when you got to Gene's house?

A We were swimming and playing with the kids.

THE COURT: Pardon me. Do you know how much time went by between the first visit and the second visit?

THE WITNESS: I don't recall.

THE COURT: About how much time?

THE WITNESS: A few months.

THE COURT: All right.

Q How old were you the second time you went there?

A Ten.

Q All right. And was that last year?

A Yes.

Q Now, what did you do after you finished playing and going swimming?

A Took pictures again.

Q Who took pictures?

A Gene.

Q And who did he take pictures of?

A Me, my father.

Q Did he take pictures of you and your father together?

A Yes.

Q When he took these pictures, did you have any clothes on?

A No.

Q Did your daddy have any clothes on?

A No.

MR. VANNORMAN: Your Honor, may we approach the Bench?

THE COURT: Yes.

(Discussion at the Bench, on the record.)

MR. VAN NORMAN: Your Honor, at this time we would object to the questions that are being asked based upon the fact that they are leading questions. Now, there is no evidence before this Court or any indication before this Court that there is a need for

leading questions to prompt this particular witness. Thus far she has given indications--

THE COURT: All right. I will ask counsel, if you will, at least attempt to get her to tell us what happened and if her responses are withdrawn or the like, we will make a judgment at that time. But I think counsel is right.

MR. VAN NORMAN: And I respectfully request at this time to strike the answers given to the last four questions.

THE COURT: No, I think that counsel had a right to in some way lead this witness by reason of her age. But I am going to direct you now to just say what happened when she got there the second time.

MR. BEKOFF: All right.

THE COURT: All right.

(The following occurred in Open Court.)

Q Tammy, please tell the Court what happened when Gene took these pictures, what were you and daddy doing at that time?

MR. VAN NORMAN: Your Honor, I object.

THE COURT: I will do it; Tammy, you went

there once in 1969?

THE WITNESS: Yes, sir.

THE COURT: And you were about nine years of age?

THE WITNESS: Yes, sir.

THE COURT: And you went a few months later and you were ten years of age?

THE WITNESS: Yes, sir.

THE COURT: Do you know what year that was?

THE WITNESS: 1970.

THE COURT: Now, tell us what happened the first time you were there, just in your own words?

THE WITNESS: Took pictures.

THE COURT: Tell us what you were doing when the pictures were taken?

THE WITNESS: We were in the bed.

THE COURT: You were in the bed?

THE WITNESS: Yes.

THE COURT: And what was happening when you were in the bed?

(No response.)

THE COURT: Look at me. I know this is very

difficult for you. But say it and get it over with.

All right. All right, sweetheart?

Now, can you tell us what happened?

(No response.)

MR. VAN NORMAN: I request a recess at this time, your Honor.

MR. BEKOFF: Your Honor, at this time we have reached the point where I should have a certain amount of leading.

THE COURT: All right.

Q All right. Tammy, do you know what a man's pee-pee is?

A (Witness nods head yes.)

Q What did your daddy do with his pee-pee?

MR. VAN NORMAN: Your Honor, I am sorry, as I have indicated to you at the Bench, if you wish I will make the motion at the Bench, but--

THE COURT: I understand the motion and the motion is denied.

MR. VAN NORMAN: Exception, your Honor.

THE COURT: All right.

Q Tammy, what did your daddy do with his pee-pee?

MR. VAN NORMAN: Objection, your Honor. I'm sorry. There is no foundation laid whatsoever for the question or questions that are being asked now; number one, they are leading and, secondly, there is no foundation to bring them up to that point.

MR. BEKOFF: If it please the Court, two things, I would ask counsel to step back and keep his voice down, and two, I don't need a foundation for leading questions to a witness of this age.

THE COURT: What was your answer to that question?

THE WITNESS: He stuck it in mine.

THE COURT: He stuck it in yours?

THE WITNESS: Yes.

THE COURT: In your what?

THE WITNESS: In my wee-wee.

THE COURT: All right.

Q And did he do anything else with his pee-pee other than stick it in yours?

A (Witness shakes head no.)

MR. VAN NORMAN: Your Honor, not to burden the record, but we will continue the objection.

THE COURT: You have a continuing objection.

Q Tammy, did he do anything else with it?

A Put it in my mouth.

Q All right. Now, did anything happen after you were finished doing this?

A We went home.

Q All right. Did Mr. Abrams take pictures of all this?

A Yes.

Q After it was finished, did you see Mr. Abrams give your daddy anything?

A Yes.

Q What did he give him?

A Me?

Q No, your daddy.

MR. VAN NORMAN: Objection to the form, your Honor, immaterial and collateral and nothing based upon the case in chief.

THE COURT: Overruled. Did he give your daddy anything?

THE WITNESS: Yes.

THE COURT: What?

THE WITNESS: Money.

Q Honey, did you go back to Gene Abrams' house again?

A Yes.

Q Was that in March, 1971?

A Yes.

Q How old were you then?

A Still ten.

Q What happened then at that time?

A We took pictures again.

Q Who took pictures of whom?

A Gene.

Q And who did he take pictures of?

A Me and my father.

Q What did you and daddy do this time?

A The same thing.

Q Did he put his pee-pee in your--

THE COURT: She said, "the same thing."

MR. BEKOFF: All right.

Q And after it was finished, did you see Gene give anything to your daddy?

A Yes.

Q What?

A Money.

Q Did you ever tell mommy what happened?

A No.

Q Why not, Tammy?

MR. VAN NORMAN: Objection, your Honor.

THE COURT: Objection sustained.

Q Did your daddy ever tell you anything?

A He told me not to tell her.

Q All right.

MR. VAN NORMAN: Objection.

THE COURT: Overruled.

Q I am now holding up People's Exhibit 26,  
in evidence, your Honor. Tammy, do you recognize this?

A Yes.

Q Do you know who owns that?

A Yes.

Q Who?

A My father.

Q Did he wear this on any time you went there?

A Yes.

Q I am now holding up People's Exhibit 27, in

evidence. Do you recognize that?

A Yes.

Q Who owns this?

A My father.

Q Did he wear this at any time you went there?

A Yes.

MR. BEKOFF: Your Honor, at this stage, I would ask that I be permitted to show the pictures to the jury.

THE COURT: No. I think that--Gentlemen, do you wish to be present?

MR. VAN NORMAN: Yes, your Honor.

(Discussion at the Bench, out of the hearing of the jury but on the record.)

THE COURT: Sweetheart, if pictures are shown to you, do you think you can say whether or not you recognize them or not?

(Witness nods head yes.)

THE COURT: We won't ask you to look at them too long but just if you can recognize anybody in the pictures. All right?

(Witness nods head yes.)

THE COURT: Let me have the pictures.

MR. VAN NORMAN: Your Honor, may we have a discussion at the Bench.

THE COURT: All right.

(Discussion at the Bench, on the record.)

MR. VAN NORMAN: Your Honor, we wish to point out to the Court that the specificity of the crime is now in question. Therefore, we would want and request time and place and the actual act that she describes to be the actual act that is purported in the pictures. Not that they were taken maybe in March and this is the act that she is describing in November or vice-versa. But that she can identify these pictures, in essence that this is the November picture and this is the March picture, and so on. And I respectfully request that this be the direction given to her in the identification of the pictures rather than I stand before this jury and make an objection. It would be prejudicial.

THE COURT: I understand your position. This Court feels that I should handle the matter of the pictures. Do you have any objection to that?

MR. VAN NORMAN: I have no objection.

MR. BEKOFF: None whatsoever, your Honor.

THE COURT: All right.

(The following occurred in Open Court.)

THE COURT: All right. Are you all right now?

THE WITNESS: Yes.

THE COURT: I am showing the witness People's Exhibit 9, in evidence. Do you know who that is?

THE WITNESS: That's me.

THE COURT: And that, (indicating)?

THE WITNESS: My father.

THE COURT: All right. Do you know who that  
is?

THE WITNESS: My father.

THE COURT: And this?

THE WITNESS: That's me.

THE COURT: Referring to People's Exhibit 12.  
Referring to People's Exhibit 5, is that your father?

THE WITNESS: Yes.

THE COURT: Is that you?

THE WITNESS: Yes.

THE COURT: Referring to People's Exhibit 4,

in evidence, do you recognize anyone in that picture?

THE WITNESS: Yes.

THE COURT: Who is that?

THE WITNESS: Me and my father.

THE COURT: Do you recognize anybody in that picture?

THE WITNESS: That was me.

THE COURT: And who else?

THE WITNESS: I don't know.

THE COURT: The answer to People's Exhibit 24, in evidence, "It was me, but I don't know who the other person is." That's Exhibit 24. Do you recognize anyone in this picture?

THE WITNESS: Yes, me and my father.

THE COURT: People's Exhibit 7, do you recognize anyone there?

THE WITNESS: Yes, me and my father.

THE COURT: Do you recognize anyone in that picture, Exhibit 22?

THE WITNESS: Me and my father.

THE COURT: Do you recognize anyone in that picture?

THE WITNESS: Me and my father.

THE COURT: That was People's Exhibit 3;  
and the prior one was People's Exhibit 22. Do you  
recognize anyone in this picture?

THE WITNESS: That's me.

THE COURT: Who is that?

THE WITNESS: My father.

THE COURT: All right. People's Exhibit 23?

THE WITNESS: That's me and my father.

THE COURT: Do you recognize anybody in that  
picture?

THE WITNESS: That's me.

THE COURT: And who is that?

THE WITNESS: I don't know.

THE COURT: People's Exhibit 17, for identifica-  
tion, she said, "It's me. I don't know who the  
other person is." People's Exhibit 6, for identifica-  
tion?

THE WITNESS: That's me and my father.

THE COURT: People's Exhibit 8, for identifica-  
tion?

THE WITNESS: That's me and my father.

THE COURT: People's Exhibit 10, for identification?

THE WITNESS: That's me and my father.

THE COURT: People's Exhibit 11, for identification?

THE WITNESS: That's me and my father.

THE COURT: People's Exhibit 13, for identification?

THE WITNESS: That's me. I don't know who that is.

THE COURT: That was People's Exhibit 13, for identification. People's Exhibit 19, for identification?

THE WITNESS: That's me. I don't know who that is.

THE COURT: People's Exhibit 19, for identification, "That's me. I don't know who the other person is." People's Exhibit 18, for identification?

THE WITNESS: That's me.

THE COURT: Anyone else you recognize?

THE WITNESS: No.

THE COURT: All right. People's Exhibit 18,

"That's me. I can't recognize the other person."

All right. You want to step outside now and have a little soda?

THE WITNESS: All right.

THE COURT: All right. Madam and gentlemen of the Jury, there will be a five minute recess and we will continue in about five minutes. Again, the admonition, please do not talk to each other. Do not dwell upon findings in your own mind at this time. This matter has not been submitted to you for your judgment and determination. Until that time arrives, you should not make a judgment. All right. This Court stands recessed for five minutes.

Counsel will remain.

(Jury leaves the Courtroom.)

THE COURT: Gentlemen, I have separated the photographs into two divisions. One, where she identifies both herself and her father. The other where she identifies herself only and not her father. As to those that she has indicated she identifies herself, they are as follows:

People's Exhibit 19, for identification,

People's Exhibit 18, for identification, People's Exhibit 13, for identification. I am sorry.

People's Exhibit 13 is in evidence which this Court may have a further ruling on in view of the fact they have not at this point been viewed by the jury.

People's Exhibit 24, in evidence. She recognizes herself but not her father. People's Exhibit 17, for identification. She recognizes herself, not her father.

Now, with regard to the balance, she identified herself and her father in People's Exhibit 9, in evidence; 12, in evidence; 5, in evidence; 4, in evidence; 16, in evidence; 7, in evidence; 22, in evidence; 3, in evidence; 15, in evidence; and 23, in evidence.

MR. VAN NORMAN: Your Honor, these two, assuming that she can give us a time and place, People's Exhibit 23 and People's Exhibit 22, in evidence, we continue the objection, however, these two would show, if they were admitted and shown to the jury, the possibility based upon the camera angle, of a sodomous act being committed between two parties.

However, all the rest of the pictures, namely, People's Exhibit 9, People's Exhibit 12, 5, 4, 16, 7, 3 and People's Exhibit 15, in no manner, shape or form, have anything but a highly emotional and inflammatory base. They do not show the commission of incest. They do not show the commission of rape. And they do not show a sodomous act being committed by the parties.

THE COURT: Do you wish to be heard?

MR. BEKOFF: Well, your Honor, she has testified that these are the things she has done, and Mr. Abrams took pictures of that.

MR. VAN NORMAN: She hasn't testified.

MR. BEKOFF: She has testified that these are the things she has done, that Mr. Abrams has taken pictures of.

Your Honor, these pictures themselves are the best evidence. They are part of the res gestae. Now, these are enough to corroborate what she said. These are what happened. Now, the People don't have to show each and every element in every picture, your Honor. They are certainly material. They certainly

reflect on what happened.

MR. VAN NORMAN: In the crimes that are charged, they must show in the corroboration, the necessary, absolute elements of corroboration in each material detail.

THE COURT: I am not so convinced.

MR. VAN NORMAN: These do not show any material detail of a rape, sodomy or an incestuous act. They may show prior to, they may show after, but they do not show the very act complained of in the Information laid before the Court.

THE COURT: Well, I am not so sure whether or not the pictures can corroborate her testimony or she can testify to corroborate the pictures, the evidence of the pictures.

MR. VAN NORMAN: The pictures are not the question in this Courtroom concerning this trial, it is whether or not this child was raped and which requires certain necessary elements. And these pictures do nothing but inflame the jury once they are shown to the jury and do not show the commission of a rape. They may show the commission of several other

crimes which I would find totally horrible, but--

THE COURT: I understand your position. I don't have the answer to it at this time. I don't mean to cut you short. What I would like to do is to clear up the record with regard to these four photographs. Go back and talk to me about People's Exhibit 10, 11, 6 and 8, Mr. Court Reporter.

MR. VAN NORMAN: Would it be easier, your Honor, if we just bring her back?

THE COURT: No. Why subject her to anything further.

(Testimony read back by the Reporter.)

THE COURT: All right. She did testify to "Me and my father", with regard to People's Exhibit 6, for identification?

COURT REPORTER: Yes, your Honor, that's what I have.

THE COURT: All right. Off the record.

(Discussion off the record.)

THE COURT: All right. We will take a short recess.

(Recess.)

(After Recess.)

(Jury present.)

(Defendant not present.)

THE CLERK: People versus Thomas Francis Byrnes.

Trial continued.

THE COURT: Come up here, gentlemen.

(Discussion at the Bench, on the record.)

THE COURT: Gentlemen, I am going to allow into evidence the following numbered photographs:

People's Exhibit 23, People's Exhibit 22, People's Exhibit 16, People's Exhibit 15, People's Exhibit 12, People's Exhibit 11, People's Exhibit 10-- Pardon me--the numbers I have just given you with the exception of 10, have already been marked in evidence but have not been viewed by the jury. People's Exhibit 10, is marked for identification. Is there an application?

MR. BEKOFF: Yes, I move to have it entered into evidence at this time, your Honor.

MR. VAN NORMAN: Objection, your Honor.

THE COURT: Overruled.

(People's Exhibit 10, for identification, now

marked as People's Exhibit 10, in evidence.)

MR. BEKOFF: I offer Exhibit 11, into evidence.

MR. VAN NORMAN: Objection.

THE COURT: Overruled.

(People's Exhibit 11, for identification, now marked as People's Exhibit 11, in evidence.)

THE COURT: All right. People's Exhibit 9 also marked in evidence is to remain in evidence. People's Exhibit 8, for identification?

MR. BEKOFF: I move to enter it into evidence, your Honor.

MR. VAN NORMAN: Objection.

THE COURT: Overruled.

(People's Exhibit 8, for identification, now marked as People's Exhibit 8, in evidence.)

THE COURT: All right. People's Exhibit 7, likewise already in evidence and not viewed by the jury, continued in evidence. People's Exhibit 6, for identification?

MR. BEKOFF: I move to enter it into evidence.

MR. VAN NORMAN: Objection.

THE COURT: Overruled.

(People's Exhibit 6, for identification, now marked as People's Exhibit 6, in evidence.)

THE COURT: People's Exhibit 5, already in evidence, to remain in evidence. People's Exhibit 4, already in evidence, to remain in evidence. People's Exhibit 3, in evidence, to remain in evidence. With regard to People's Exhibits 19, 18, 13 and 17, previously marked for identification, only, is there an application?

MR. BEKOFF: I move that they be marked into evidence, your Honor.

MR. VAN NORMAN: Objection.

THE COURT: Objection is sustained. They will not be marked into evidence. As to People's Exhibit 24, already marked in evidence, there has been testimony by the wife that she recognizes both the daughter and the father. However, the daughter indicates that she recognizes herself but not her father. In that regard, do the People have an application?

MR. BEKOFF: No, your Honor. I know what you are aiming at but I am going to have to ask that

it be shown to the jury on the fact that the mother of the girl Tammy and the wife of the husband, recognizes both. Tammy recognizes herself. And also identification has been made of the husband through his shirt. Now, your Honor, the pictures are taken in exact sequence as to the shirt and the fact that the woman can identify him--

THE COURT: I think in view of the fact there has been verbal testimony as to certain acts with regard to what occurred and also taking into consideration there are other pictures depicting the very same item, I think it is cumulative in nature and your application is denied.

MR. VAN NORMAN: I would object.

THE COURT: Objection sustained.

MR. BEKOFF: Your Honor, we would have to take it out of evidence then.

THE COURT: Yes. The Court previously had this photograph marked into evidence. It is now taking it out of that category and placing it in the file containing other pictures marked for identification only. Indicate that on the picture.

COURT REPORTER: Yes, sir.

MR. BEKOFF: I except to that, your Honor.

THE COURT: All right.

(People's Exhibit 24, in evidence, now marked as People's Exhibit 24, for identification only.)

MR. BEKOFF: And at this time, your Honor, I would pray the Court leave to delay the viewing of these photographs until after this witness has testified.

THE COURT: All right. But they certainly may be used on direct if necessary or on cross examination.

MR. BEKOFF: Fair enough.

THE COURT: With regard to viewing them on the part of this jury, I think it is best reserved for some other time. Do you have any objection to that?

MR. VAN NORMAN: No, your Honor.

THE COURT: All right. The photographs just mentioned are admissible in evidence, that is, I am referring to those which the Court has received into evidence, the Court holds that a proper foundation has been laid, the persons depicted in the photographs

have been identified by the witness, Tamara Byrnes, the place has been identified, and the authenticity of the photographs, for example, the printing of the photographs from the negative has been testified to. There has been further testimony from the witness, Tammy Byrnes, that on two or possibly three occasions, she was in bed with her father and that they were without clothing. You have your exception.

MR. VAN NORMAN: I wish to take an exception to that and I also wish to state, your Honor, what you state may be true, but there is no connection in what she has testified to the very pictures you are trying to place into evidence. So we strongly object to the foundation based upon the specificity necessary for anything to be introduced to this jury.

THE COURT: She has testified that in her own language, that his penis was in her mouth and in her, I think she described it as her wee-wee. I am not sure what she said, but referring to her private part below.

MR. VAN NORMAN: But there is a time and place for these things and there is an indictment that

specifies a time and place when these acts took place.

THE COURT: She testified they happened in the latter part of 1969 and the early part of 1970. That she was nine years of age at the first occurrence and that she was ten years of age at the second occurrence.

MR. VAN NORMAN: May I respectfully request you ask her if she has ever seen these pictures before, your Honor, and I think you can determine she has never seen these pictures. She has never testified that these specifically showed the acts that were committed on the very day she is saying these things happened between her and her father.

THE COURT: I will ask that question.

MR. VAN NORMAN: That's the point we are trying to get to.

MR. BEKOFF: I would point out to the Court, in your recollection of the testimony, there were three occasions, the first one in 1969 which she testified just the pictures were taken and the two latter occasions.

THE COURT: All right. That is something you

can argue to the jury. There is ample testimony.

MR. BEKOFF: All right.

(The following occurred in Open Court.)

THE COURT: Counsel, come up again, off the record.

(Discussion at the Bench, off the record.)

THE COURT: All right. Bring the witness in.

(Tamara Byrnes resumes the witness stand and previously duly sworn.)

THE COURT: All right. Now, Tammy, I just have one question more for you and then I will ask the lawyers to ask you a few questions. But don't worry about it. They are just as kind, both of them. Have you ever seen those pictures before today?

THE WITNESS: No.

THE COURT: Didn't you answer before that--

THE WITNESS: I saw different ones.

THE COURT: You saw different ones?

THE WITNESS: Yes, sir.

THE COURT: All right.

MR. BEKOFF: May I inquire?

THE COURT: Yes.

MR. VAN NORMAN: For the record, your Honor,  
I renew the motion I made at the Bench.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. BEKOFF (Continuing):

Q Tammy, these pictures that you were shown,  
do you know from looking at the pictures where they were  
taken?

A At Gene's.

Q And do you recall anything about the pictures  
which would make you say they were taken at Gene's house?

A His house.

Q Now, Tammy, you told us that you went to  
Gene's house three times, is that right?

A Yes.

Q Summer of '69, around November in '70 and March  
of '71?

A Yes.

Q And that all these acts that you told us about  
occurred in November of '70 and March of '71?

A Yes.

MR. VAN NORMAN: Objection, your Honor.

THE COURT: Overruled.

Q And how old were you at the time?

A Ten.

Q Now, you told us that on two occasions your father wore this on one occasion and this on another occasion, (indicating). Do you recall when he wore these, which was which?

A I don't recall. I know he wore them.

Q Now, Tammy, these pictures that his Honor showed you, do they show fairly and do they represent what happened in November of 1970 and March of 1971?

MR. VAN NORMAN: Objection, your Honor. You can't have a cumulative answer to a specific question, your Honor. Piece by piece.

THE COURT: It is the burden that we place upon this witness. If that be your pleasure, I will sustain the objection. But I will just go so far with it.

MR. VAN NORMAN: I have to defend the rights of my client.

THE COURT: I understand that. And I am going to sustain it for so long as I can do so.

MR. BEKOFF: May I have these photographs shown to the witness please?

Q Will you look at those pictures.

A Look at them?

Q Yes.

A All of them?

Q Just glance at them.

(Witness complies.)

Q Tammy, do those pictures that I just showed you fairly represent what happened?

A Yes.

Q When you and daddy were in Gene Abrams' house in November of '70?

Yes.

MR. VAN NORMAN: I object to the form of the question, your Honor. Again specificity, your Honor, picture at a time. Time and place when those pictures were taken.

MR. BEKOFF: Your Honor, that's exactly what my question was, do they fairly represent what happened between her and the defendant in November, 1970.

THE COURT: Overruled.

MR. VAN NORMAN: Exception.

THE COURT: Exception is noted.

MR. BEKOFF: May I have these pictures shown to the witness please.

THE COURT: Let me have those pictures please and let the record indicate she was referring to People's Exhibit 12, in evidence, 11 in evidence, 10, in evidence, 9, in evidence, 8, in evidence, 7, in evidence, 6, in evidence, 5, in evidence, 4, in evidence, and People's 3, in evidence.

MR. VAN NORMAN: May I have it read back when she said these pictures were taken, your Honor?

THE COURT: I don't know whether she answered that specific question. Do you want me to ask her?

MR. VAN NORMAN: Yes, your Honor.

THE COURT: Now, you look at these pictures and tell me whether or not you can say whether these pictures, not the other pictures, these pictures were taken at the same time, all right?

THE WITNESS: I don't recall.

THE COURT: Just look.

(Witness complies.)

THE COURT: All right. Now, do you know if these set of pictures were taken at one time, that is, you testified there were three times?

(Witness nods head yes.)

THE COURT: Do you know whether or not these set of pictures were taken during one of those times?

THE WITNESS: I don't recall.

THE COURT: She does not remember.

MR. BEKOFF: Your Honor, can I pursue this a little further?

THE COURT: All right.

DIRECT EXAMINATION

BY MR. BEKOFF (Continuing):

Q Tammy, how many times did your daddy wear this shirt at Gene Abrams' house?

MR. VAN NORMAN: Objection, asked and answered.

THE COURT: Overruled.

A I think once.

Q Would you look at those pictures again and see if daddy has that shirt on in all of those pictures?

MR. VAN NORMAN: Your Honor, best evidence.

THE COURT: All right. The pictures speak for themselves, counsel for the defense says.

MR. BEKOFF: All right. Could I have the witness look at the pictures anyway?

THE COURT: No. I think he has indicated if the pictures indicate that he was wearing that sweater, then they speak for themselves.

MR. BEKOFF: Fair enough. May I have the other batch of pictures shown to the witness and examined and identified for the record please?

THE COURT: What's the question you have?

MR. BEKOFF: I would ask her to look at those pictures and if they are fair and accurate representations of what took place in March, 1971.

THE COURT: Do you understand the question?

MR. VAN NORMAN: Objection to the question, your Honor.

THE COURT: Do you understand the question?

(Witness shakes head no.)

THE COURT: Rephrase the question.

Q Tammy, I ask you to look at the pictures and I will ask you if those pictures show what took place

between you and daddy in March of 1971, the last time you went there?

A I don't know.

THE COURT: She said she does not know.

Q Tammy, daddy wore this shirt there, (indicating)?  
(Witness nods head yes.)

Q How many times did he wear it?

A Once.

MR. BEKOFF: That was People's Exhibit 27,  
in evidence.

THE COURT: All right.

MR. BEKOFF: Your Honor, I have no further  
questions of this witness.

MR. VAN NORMAN: The defense reserves the right  
to call the witness at some other time, your Honor.  
But at this time we would not make any cross examina-  
tion.

THE COURT: Fine.

(Private discussion between the Court and  
the Witness.)

THE COURT: All right. Madam and gentlemen  
of the jury, this Court stands recessed until two